

Creative destruction and the post COVID-19 economy: a critique of the (un)creative rescue value contained within the permanent CIGA 2020 reforms.

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Abstract

The Corporate Insolvency and Governance Act 2020 was enacted to encourage company rescue, but questions remain as to whether the reforms have in some instances artificially extended the life span of companies that would have otherwise failed. This article explores whether creative destruction has been disrupted which has prevented wealth creation through its pro-rescue policies.

Key words: company; COVID-19; creative destruction; insolvency law; value.

1. INTRODUCTION

In response to the coronavirus pandemic (COVID-19), various economic and statutory measures were adopted by governments around the world in the hope that it would enhance company survival, avoid large scale unemployment, and discourage the recirculation of capital. In the UK, a consultation on the insolvency reforms required to ensure that the UK's framework remained fit for purpose had already occurred in 2016 and 2018,² with the proposed recommendations intended to improve the UK's standing in the now defunct World bank rankings.³ Due to legislative capacity as a result of a focus on insolvency in the context of the pandemic, the recommendations were subsequently rushed through to enact the Corporate Insolvency and Governance Act 2020 (hereafter "GIGA 2020").⁴

The context of the 2016 consultation was quite removed from the events that were to unfold in 2020, yet the overall objective remained similar in that measures were required to ensure that businesses could deal with financial distress effectively. The 2016 consultation provided a solid foundation for reform since it helped to determine whether the UK's insolvency regime was fit for

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² See the government's response to its May 2016 consultation 'A Review of the Corporate Insolvency Framework' published on 26 August 2018.

³ The report was discontinued by the World Bank on September 16, 2021, following the release of an independent audit of the data irregularities, see R Machen et al., 'Investigation of Data Irregularities in Doing Business 2018 and 2020', (15 September 2021) Wilmer Hale; World Bank Statement, 'World Bank Group to Discontinue Doing Business Report', (16 September 2021), available at <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report>.

⁴ Amended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 ('CIGA Regs 2021').

purpose, and if it reflected international principles developed by the World Bank⁵ and the United Commission on International Trade Law (UNCITRAL).⁶ At the time, it was also the intent of the UK to maintain its position as one of the top destinations to do business as assessed by the World Bank.⁷ While the credibility of these rankings have since been questioned,⁸ the UK still recognised that there was a need to strengthen its corporate insolvency regime to compete with other European insolvency frameworks; a matter that has since become more profound post Brexit.⁹

Prior to the enactment of the CIGA 2020, an opportunity was taken to permit specific measures to deal with the economic impact of the pandemic (this will be referred to as the COVID-19 economy). Of these measures, some were designed to be temporary,¹⁰ and others provided for permanent change to the UK's insolvency framework. In regard to the permanent changes, the introduction of a new standalone company moratorium permits eligible businesses time to restructure or seek new investment free from creditor action.¹¹ Other permanent changes include a ban on terminations provisions,¹² and the introduction of a new pre-insolvency rescue and organisation which will assist an insolvent company in preserving its business critical contracts with a view to facilitating a rescue of the company or its business.¹³ Collectively, these measures promote company as opposed to business rescue, which may have an impact on what value can be realised within an insolvent company.

The economic viability of a rescue plan permits a level of professional discretion to be applied,¹⁴ which permits the purpose of rescue to be broadly conceived.¹⁵ In most cases while there is a preference to preserve the going concern value of the company, as it often results in a higher value

⁵ *Principles for effective insolvency and creditor and debtor regimes (English)* Washington, D.C.: World Bank Group (2015) <<http://documents.worldbank.org/curated/en/518861467086038847/Principles-for-effective-insolvency-and-creditor-and-debtor-regimes>>.

⁶ The Creditor Rights and Insolvency Standard (2011) combines the World Bank 'principles' and the UNCITRAL 'Legislative Guide'.

⁷ In the 2015 World Bank Doing Business report the UK was ranked as 8th overall. In the 2020 edition it was also 8th (rising from 9th last year), which makes it the second best in Western Europe after Denmark.

⁸ See, G McCormack, 'Why "Doing Business" with the World Bank may be bad for you', (2018) 19(3) *European Business Organization Law Review* 649.

⁹ See E Vaccari, 'WHOA, Brexit! What future for London as Europe's (largest) insolvency forum?', (2022) 37(2) *Journal of International Banking Law and Regulation* 46.

¹⁰ The temporary measures are only briefly explored in this paper due to their limited status, yet it is worth noting that some measures. These measures included: the temporary exclusion for small suppliers (CIGA 2020 s15(2)(b); extended by CIGA Regs 2021 reg.3(2) to 30 June 2021.); the temporary prohibitions on winding up petitions and orders (CIGA 2020, Sch. 10, Part 1 s.1(3)(b); extended by CIGA Regs 2021 (S.I. 2001 No 718) to 30 September 2021.); and temporary suspension of liability for wrongful trading (CIGA 2020 s2(2)(b); extended by CIGA Regs 2021, reg. 2 to 30th June 2021).

¹¹ Directors of insolvent companies, or companies that are likely to become insolvent, can obtain a 20 business day moratorium, see CIGA 2020 inserts a new Part A1 into the IA 1986.

¹² See extension of prohibition on termination of contracts "by reason of" (or "ipso fact") insolvency, which is extended by a new s.233B to the IA 1986 (as set out in Schedule 4ZZA).

¹³ Part 26A of the Companies Act 2006. The first decision to sanction a restructuring plan under the Companies Act 2006 Pt 26A was *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) in which Snowden J said that it is clear the court has a general discretion whether to sanction a restructuring plan under Part 26A, see para [45].

¹⁴ It should be noted that not all rescue procedures are required to be undertaken by an IP. For example, a 26A restructuring plan is not an insolvency procedure so does not require the involvement of an IP.

¹⁵ D Burdette and P Omar, 'Why Rescue? A Critical Analysis of the Current Approach to Corporate Rescue', in J Adriaanse and J van der Rest (eds) *Turnaround Management and Bankruptcy* (London: Routledge, 2017) 211-237; for IP discretion, see J Wood, 'Insolvency office-holder discretion and judicial control' (2020) 6 *JBL* 451; on the development of IP discretion, see J Wood, 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour' (2019) 19(2) *JCLS* 333.

being achieved in comparison to the piece-meal liquidation of the estate,¹⁶ rescue can achieve a range of outcomes. While the focus is likely to be on the mere monetary reimbursement of creditors, company rescues are important since they are crucial drivers of growth, innovation, change, knowledge and wealth.¹⁷ Yet, while it is these drivers that tend to offer progressive benefits to the economy and society,¹⁸ the rescue and the rehabilitation of distressed companies prior to CIGA 2020 tended to be more limited and were subject to not only the economic conditions driven by Capitalism,¹⁹ but also wider creditor rights. These creditor rights were less hindered in comparison to the post CIGA 2020 measures since, for example, the standalone moratorium did not exist, which permitted creditors with certain types of security to pursue their debt.²⁰

To that end, current rescue practice is not only conditional on the usual threshold of providing an economic benefit (creative value) that is greater than its destructive counterpart (the detrimental loss to creditors and society should the company fail), but it is also subject to how corporate insolvency law has developed in response to the post COVID-19 economy. If a company is not economically viable, then it should be subject to the markets, which will mean creative destruction may occur. This process plays an important role whereby failed companies are replaced with the creation of new entrants by entrepreneurs in the markets (created wealth).²¹ It is this process that permits optimum rescue values within the company to be pursued – whether that leads to company or business rescue.

To address these matters, this article will first consider the impact of COVID-19 on business wealth creation and explores the COVID-19 economy to determine what changes need to be considered. The second section examines the significance of CIGA 2020, before the concept of creative destruction is examined in section three. Section four examines the different values in the company that could be rescued, before the final section ends with the conclusion.

2. THE IMPACT OF COVID-19 ON BUSINESS WEALTH CREATION

The economic repercussions of the pandemic have led to an array of changes to laws, processes, and customs so that the threats that impede economic growth could be addressed.²² In the UK, measures were taken to alleviate the impact of the pandemic, such as the temporary suspension of wrongful trading for directors who traded during the relevant period,²³ the prohibition of suppliers from terminating contracts, and winding up petitions against companies were largely suspended.²⁴ If these issues were not properly addressed then it was believed that it would likely lead to the unnecessary failure of companies, create an uncertain environment for creditors and debtors, and contribute to

¹⁶ V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: University Press, Cambridge, 2017) at 118.

¹⁷ See, D Baird, 'The Uneasy Case for Corporate Reorganization' (1986) 15 *LS* 127.

¹⁸ Decisions to pursue rescue should provide outcomes that contain ascertainable benefits, even if they are temporary, so that viable businesses can continue to contribute positively to society, see S Thomas, 'Law and the circular economy' (2020) 1 *JBL* 62.

¹⁹ Burdette and Omar, *op cit.*, (2017), n 15.

²⁰ Fixed or floating charges, as set out in CA 2006, Chapter 1, Part 25.

²¹ Creative destruction in this context was developed by the Austrian political economist Joseph Schumpeter, see J Schumpeter, *Capitalism, Socialism, and Democracy*, (3rd edn, Harper, New York: 1942).

²² Emergency moves dealing with insolvency are not without precedent, see S Baister and J Tribe, 'The suspension of debt obligations and bankruptcy laws during World War I and World War II: lessons from private law during the corona pandemic from previous national crises (2020) 33(3) *Insolv. Intell.* pp 67-77.

²³ The relevant period was extended on several occasions with the final date which ended on 30th September 2021.

²⁴ CIGA 2020, ss10 and 11, Schedules 10 and 11.

credit scarcity which would increase the overall financial destruction caused by the pandemic.²⁵ Yet, to determine whether these measures would be appropriate or effective is complex because an economy, broadly conceived, is an intricate notion that involves practices, discourses and material expressions associated with the production, use and management of resources.²⁶ In other words, a market economy has processes that reflect its culture, evolution, history, legal systems, political structures, social organisation, and values. In addition to other factors such as the geography, natural resources endowment, and ecology, which give an economy its context, content, and set the conditions and parameters in which society fulfils its needs,²⁷ it is these factors that must be negotiated when attempts are made to alter rescue policy to save companies that would have otherwise naturally failed.

For some jurisdictions a shift in its insolvency philosophy would be required to deal effectively with the economic impact of COVID-19. For example, CIGA 2020 added a new standalone restructuring mechanism to its restructuring options but by doing so it brought the UK's insolvency framework closer to that associated with the US Chapter 11 bankruptcy Code.²⁸ Further measures, such as the inclusion of a cross-class cram down as well as a statutory moratorium, both of which were not available in a single restructuring option prior to CIGA 2020 were hoped to provide major benefits to businesses in the UK as it recovers from the aftermath of COVID-19.²⁹ However, despite the low amount of restructuring plans that have been sanctioned,³⁰ it is important to note that this is likely to change in 2022.³¹ Yet, while these CIGA 2020 measures may become more utilised and are reflective of the Chapter 11 statutory framework,³² it is significant to recognise that the UK has not instinctively imitated Chapter 11.³³ Instead, what had occurred was part of a selective process whereby the UK endorsed the Chapter 11 measures that it perceived would offer businesses greater protection against adverse economic conditions beyond what the current insolvency laws afforded.

In this respect, CIGA 2020 represented efforts to help companies adapt and acclimatise to the economic challenges caused by the pandemic and to ensure companies continued to create value within their business, which would also benefit the wider economy through job creation and research/technology development. Yet, wealth creation within most companies is reliant on their ability to create valuable goods and services using efficient methods, which is likely cause difficulties to some businesses when faced with changes to the economy and consumer shopping habits. Since the productivity of companies defines the wealth of the country,³⁴ inefficient companies can lead to wealth destruction. This is problematic as it can lead to financial losses for creditors, cause job losses,

²⁵ See the OECD report, 'Supporting businesses in financial distress to avoid insolvency during the COVID-19 crisis' (27 May 2020), at 7. To deal with credit issues it is worth noting that the Coronavirus Business Interruption Scheme, the Coronavirus Large Business Interruption Scheme, and the Bounce Back Loan Scheme—replaced by the Recovery Loan Scheme from 6 April 2021, providing a total of £352bn of liquidity and loan guarantees available to businesses (19.5 per cent of GDP).

²⁶ P James et al., *Urban Sustainability in Theory and Practice: Circles of Sustainability* (London: Routledge, 2015) at 53.

²⁷ M Rabie, *A Theory of Sustainable Sociocultural and Economic Development* (Springer, 2016) at 67.

²⁸ J Payne, 'Debt Restructuring in the UK' (2018) 15 EUR. CO. FIN. L. REV. 449, pp. 468–71.

²⁹ For its first application, see *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch). For arguments against cram down which will continue to exist see, *Re Virgin Active Holdings* [2021] EWHC 1246 (Ch).

³⁰ Despite the opportunistic views on the benefits of restructurings there were only seven cases in 2021 (DeepOcean, Gategroup, Premier Oil, Smile Telecoms, Virgin Active, Hurricane Energy and Amicus Finance).

³¹ See I West, 'Reflections on a year of restructuring plans', (2021) 34(3) *Insol. Intel.* pp. 62-67.

³² T Verdoes and A Verweij, 'The (Implicit) Dogmas of Business Rescue Culture' (2018) 27 *International Insolvency Review* 398, at 400.

³³ R Landry, 'Enhancing Rescue in Chapter 11: Lessons from Reform Efforts in the United Kingdom' (2020) 57(2) *American Business Law Journal* 227, at 227.

³⁴ World Economic Forum, *The Global Competitiveness Report* (2007-08) at 53.

lead to an increase in statutory winding up petitions and corporate insolvencies, and it can impact supply chains and local economies which may never fully recover.³⁵ It is this destructive force on wealth creation that needs to be addressed as companies and society come to deal with the economic fallout from COVID-19. Associated issues such as technology integration in the workplace and human capital investments will also form part of the post pandemic recovery discussion but care will be needed to manage and limit the potential destructive outcomes that could emerge.³⁶ In this respect insolvency law has a crucial role to manage wealth creation by providing the means for distressed companies to turn their business around. While it is hoped that in the UK the new moratorium and the pre-insolvency restructure under Part 26A of the CA 2006 encourages a strong rescue culture,³⁷ it must be stressed that rescue mechanisms generally are not designed to be a substitute or undermine the function of the markets in its pursuit to achieve efficiency.³⁸ Rather, ineffective companies that are do not have a viable rescue plan must be permitted to fail and not artificially prolonged because of the measures implemented in GIGA 2020.

3. THE SIGNIFICANCE OF CIGA 2020

The CIGA 2020 was enacted to include measures that would help companies address financial problems, including those specifically caused by COVID-19. This section examines the three main permanent reforms that may assist rescue and help promote wealth creation.

a) The new free-standing moratorium

While not a rescue procedure *per se*, a moratorium is a mechanism that promotes the possibility of rescue and should therefore be considered as a crucial part of a rescue process.³⁹ The usefulness of the moratorium has been known for some time since it is applied automatically to insolvent companies that enter the administration procedure, as well as small companies that wished to put a rescue plan to the company's creditors under Schedule A1 to the Insolvency Act 1986.⁴⁰ However, while the moratorium worked relatively well in such instances, its application was largely restricted since it was dependent on specific criteria being fulfilled.⁴¹ The lack of a general moratorium, and the concern of an adverse impact on rescue and restructuring strategies led to key policy objectives being developed from the 2016 Insolvency Law Consultation and the 2018 BEIS Consultation on Corporate Governance and Insolvency. The recommendations that originated from these reports largely resulted

³⁵ This is particularly true for older industrial towns, see C Beatty, 'Recovery or Stagnation?: Britain's older industrial towns since the recession' (2020) 54(9) *Regional Studies* 1238-1249. However, it is accepted that not-for-profit organisations can serve purposes that go beyond wealth maximisation.

³⁶ World Economic Forum, *op cit.*, (2007-08), n 34, at 7.

³⁷ *Re Virgin Active Holdings Limited* [2021] EWHC 1246 has effectively paved the way for restructuring plans under Part 26A to the Companies Act 2006 to be used to compromise the rights of landlords, financial creditors and other unsecured creditors provided the company shows that those creditors have no funds available. Further, in *Re DeepOcean 1 UK LTD* [2021] EWHC 138 (Ch) the provisions of Part 26A were applied, which enable a dissenting class to be bound by the plan where another class votes in favour – widely referred to as the 'cross-class cram down'.

³⁸ C Elliot, 'The Zombie Budget Deficit' (2013) 6 *Corporate Rescue and Insolvency* 78-9.

³⁹ The purpose and scope of the moratorium is discussed in length in *The Financial Conduct Authority v Carillion Plc (in liquidation)* [2021] EWHC 2871 (Ch), para 23

⁴⁰ Introduced by the IA 2000.

⁴¹ It was however possible for administration to be used as a vehicle to take advantage of an automatic moratorium while a CVA or a restructure plan was enacted.

in CIGA 2020, which was further tweaked to accommodate the impact of COVID-19 on businesses and the economy.⁴²

The free-standing moratorium is primarily intended to be used as a tool to support the rescue of a company as a going concern (as opposed to the rescue of only the company's business). The effect of the moratorium is that it provides companies with a breathing space against creditor action which also significantly controls the costs associated with the process. As such it is not a mechanism that is solely concerned with the interests of the creditors, but rather it takes into consideration the impact that financial distress has on all parties. The overall aim of the moratorium is therefore on the recovery of the company, rather than the realisation of assets; a matter that represents a philosophical shift for the UK, from a creditor-friendly insolvency framework to one that is largely debtor-focused.⁴³ To this end, the moratorium as an insolvency tool is generally in conflict with the interests it promotes since it is used in efforts that go beyond the creditors to promote broader social goals that includes protecting jobs, and the rehabilitation of the company. Nonetheless, construed narrowly the moratorium could be compatible with promoting creditor interests given its intention to maximise the value for creditors overall. However, this position is likely to be flawed since creditors generally believe that the only reason why liquidation should be avoided would be so a collective debt collection regime could deal effectively with their claims.

In regard to procedure, the moratorium is director led which leaves the directors in charge to trade the company while the IP acts as a 'monitor' to oversee the company's affairs.⁴⁴ As the directors remain at the helm of the company, unlike what occurs in classic administration, this is perceived to be another example that demonstrates the shift to a debtor driven insolvency framework and one that shares similarities with that of the US chapter 11 Bankruptcy Code.⁴⁵ However, the comparisons to chapter 11 has caused some concerns since the restructuring plan, which is reviewed in this next section below, could be used to undermine "workers' terms and conditions" as well as "end agreements with trade unions, sack workers, and rehire them on lower wages and poorer working conditions".⁴⁶ The necessity for trade-offs between interests is therefore required since it ensures that a broad range of interests can still be pursued. Given that a successful rescue would overall be of direct benefit to employees, as it would result in jobs being saved, at least in the short term, this may provide for pragmatic outcomes.⁴⁷

Access to the moratorium received some concessions under CIGA 2020 to ensure that it was widely available to enhance business recovery.⁴⁸ Yet, it is important to note that not all companies were eligible, with restrictions placed on companies that had entered into a moratorium in the last 12

⁴² The government response to both reports can be found in BEIS, *Insolvency and Corporate Governance: Government response*, (26 August 2018).

⁴³ House of Commons, *Corporate Insolvency and Governance Act 2020*, research briefing, (5 October 2021) at 10.

⁴⁴ The role of the monitor and their duties is contained within CIGA 2020, Part A1, Chapter 5.

⁴⁵ In turn, the EU introduced a similar company rescue package with its Restructuring Directive (2019/1023). The directive which had to be implemented by member states into national law by 17 July 2021, provides further evidence that the EU approach to rescue has moved closer to debtor-in-possession-type insolvency regimes.

⁴⁶ There have been suggestions that a statement from the trade union should be required to support workers, but this would add little to the process and could instead risk publicising the company's financial problems before the moratorium came into effect to protect it from creditor action. See Hansard, *Corporate Insolvency and Governance Bill*, HL Deb, 9 June 2020, vol 803, Baroness Bryan of Patrick at 5.24pm.

⁴⁷ See Paul Scully, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, Hansard, *Corporate Insolvency and Governance Bill*, HC Deb, 3 June 2020, vol 676, at 7.30pm.

⁴⁸ CIGA 2020, s.3 and Sch. 4.

months, in addition to companies that were insurance, banks, or companies that were party to sizeable capital arrangements.⁴⁹ As such there are likely to be a significant number of cases where a company is unlikely to be rescued as a going concern, but instead part of the business and the employment it supports could be sustained.⁵⁰ In such instances this would encourage alternative rescue strategies to be adopted, including non-insolvency measures, to accommodate this potential hurdle and enhance wealth creation opportunities.

In practice it is important that the moratorium is effective to permit wealth creation. To that end, once the moratorium is in place it provides for 20 business days protection from certain creditor action, which can be extended for a further 20 business days without any consent, or for longer with consent of the pre-moratorium creditors or the court.⁵¹ In likeness, it is comparable to the moratorium found within administration, and includes restrictions on insolvency proceedings, enforcement of security, and forfeiture. The IP as the monitor plays a crucial role to ensure that the focus on rescue remains the only objective.⁵² Thus, it is necessary that the IP establishes what rescue should entail and what outcomes are considered reasonable in the circumstances. Since the scope of outcomes can vary considerably due to the professional discretion applied by IPs, so too will the threshold that justifies rescue. However, should rescue not be feasible, then the moratorium must be terminated since its objective cannot be achieved.

As stated above, the consent of the monitor will be required should directors wish to undertake certain transactions, otherwise the day-to-day management of the business remains with the directors. Yet, this does not prevent directors from being able to challenge the decisions made by the monitor; they closely follow the same grounds associated with administration and liquidation, whereby actions, decisions, or failure to act on the grounds of (actual or perceived) unfair can cause harm to the applicant.⁵³ Crucially, as the directors remain in their positions, a monitor can also challenge those decisions on the same basis,⁵⁴ which could potentially lead to an increase in disputes and litigation. In an effort to encourage an element of integrity in the viability stage, new offences were created by CIGA 2020 of fraud committed during or in anticipation of a moratorium, and false representation to obtain a moratorium, to deter directors from leading on investors or the monitor to believe the company was viable and could be rescued.⁵⁵ This countermeasure is perceived to be in response to the wide discretion afforded to those involved with the moratorium process, and acts as a safeguard tool to ensure the pursuit of rescue is authentic and helps to protect the value that resides in the company.

Yet should the company's debts not be satisfied then the moratorium will cease, which makes the support from lenders crucial to the success of the moratorium. As such, it is apparent that the value of rescue is firmly in the hands of the banks or key creditors who will determine whether the support needed for the moratorium is justified with what they can expect in return. Even in instances where the monitor may consider that a company could be rescued, this will be entirely dependent on the

⁴⁹ See CIGA 2020, Sch. 1.

⁵⁰ Concerns raised by Lord Palmer of Childs Hill, see Hansard, *Corporate Insolvency and Governance Bill*, HL Deb, 9 June 2020, vol, at 3.20pm.

⁵¹ There has been calls for the UK to have an equivalent to the US's Chapter 11 legislation, see Hansard, *Corporate Insolvency and Governance Bill*, HL Deb, 9 June 2020, vol 803, Baroness Kramer at 2.18pm.

⁵² See CIGA, Part A1, A6(1)(e). The same criteria also apply to extensions, see for example CIGA 2020, Part A1, A10(1)(d). See also 'A Guide for Monitors', which was published on 26 June 2020 by the Insolvency Service.

⁵³ For example, see IA 1986, Sch B1, para 74, and para 88, which provide relief to a creditor if it can be proven that their interests were unfairly harmed, and if the latter paragraph is successful then this could lead to the removal of an administrator. See Wood *op cit.*, (2020), n 15, at 460.

⁵⁴ There is also a right for a subsequently appointed administrator or liquidator to challenge the monitor's remuneration as excessive.

⁵⁵ CIGA 2020, Chapter 7.

availability of finances needed to see the rescue through, in addition to the effect of the moratorium on insolvency proceedings and the enforcement of rights.⁵⁶

Associated with this point are the difficulties that lay with the classification of debt, with financial debts and liabilities defined as pre-moratorium debts. These types of debts are not eligible for a payment holiday, and it is expected that the payment of such debt continues otherwise the moratorium cannot be supported by the lenders.⁵⁷ Should the payment be not forthcoming the lenders could exercise their right to accelerate payments due under their lending agreements, which could accelerate the decline of the company.⁵⁸ Further, the lender could also apply pressure for an on-demand facility agreement, which for a distressed company would almost certainly mean that the monitor would have to end the moratorium, and with it any possibility of rescue.⁵⁹ It is possible that this would produce an undesired outcome for the lenders, which would likely mean that a standstill agreement would be required to permit the moratorium to continue. How probable this would be in practice would be determined on how widespread the moratorium procedure becomes in practice.

A further issue that concerns the enforcement of rights, is of course that by design they are severely restricted by the moratorium. While the moratorium is in place it restricts, without permission from the court, landlords from their right of forfeiture; there is no enforcement of security;⁶⁰ no repossession of goods under a hire purchase agreement or exercise of a retention of title clause; and there can be no legal proceedings or legal process may be raised, carried out or continued.⁶¹ In practice this position varies considerably, since interests are considered based on legal rights, which includes pre-insolvency entitlements, securities and the priority ranking of creditors. While outside of a financial distress context, to disregard creditor rights could undermine the credibility of insolvency law, the law makes provisions for this in certain circumstances which includes corporate rescue and efforts to enhance value within the company. This should be contrasted with the process contained in administration as there is no provision for the monitor to consent to such proceedings during the new standalone moratorium. In addition, the moratorium prevents an uncrystallised floating charge holder from giving notice to crystallise the floating charge or restrict the disposal of the property of the company.⁶² In respect to new security to finance rescue such security could be enforced if the monitor consented to the grant of security. Yet it should be noted that there is a restriction in the provision which suggests that there is a prohibition on the enforcement of security.⁶³ While it appears ambiguous, it is likely that for the moratorium to operate successfully, the general prohibition is highly likely to be correct. Accordingly, rescue appears to be a central concept to the new moratorium procedure and its efforts to address the financial distress is likely to have positive effects on the rescue culture and wealth creation.⁶⁴ Yet, it remains to be seen whether the moratorium will be used widely since despite its practical nature and its benefits, between 26 June 2020 and 30 September 2021, only

⁵⁶ See L Linklater and J Wildridge, 'Changing times: aspects of creditor enforcement in administration and in the new moratorium', (2020) 33(3) *Insolv. Int.* 96, at 97.

⁵⁷ See CIGA 2020, A18.

⁵⁸ Such rights are not caught by the restrictions on termination of contracts upon insolvency.

⁵⁹ An on-demand facility agreement is a standard form on-demand, unsecured, sterling facility agreement (or loan agreement) to be used for intra-group loans.

⁶⁰ Except financial collateral or a collateral security charge.

⁶¹ Except employment tribunal proceedings, legal processes arising out of such proceedings or proceedings involving a claim between an employer and a worker.

⁶² CIGA 2020, Part A1, A21(3), A22.

⁶³ CIGA 2020, Part A1, A23, A26.

⁶⁴ See P Walton, C Umfreville and L Jacobs, *Company Arrangements: Evaluating Success and Failure*, (May 2018), R3 Research Report, Part 4, Chart 5B.

14 companies obtained a moratorium.⁶⁵ Further, it is unlikely to have reach outside of the UK, which could severely limit its scope when measured against the US chapter 11 moratorium.⁶⁶ This could hinder rescue plans and diminish wealth creation opportunities if the sufficient connection is deemed to be too weak.⁶⁷

b) The new restructuring plan

Prior to the introduction of the new restructuring measures under the CIGA 2020, restructuring schemes were likely to exclude the trade creditors and involve only the finance creditors; a factor that increasingly allowed for smaller and groups of creditors to reach agreements. The exclusive nature of restructures often led to strategies that pursued outcomes based on economics and efficiency. For this reason, while the company may have ultimately been rescued through a restructuring plan, it was only concerned with measures that benefitted the company and the finance creditors, with any additional benefits to trade creditors being coincidental. Nevertheless, this approach was problematic since it assumed that the finance creditors wanted to rescue the company when in fact they may have only been interested in their individual returns, not with the longevity of the company.⁶⁸ To address these concerns, the market for distressed debt in the UK has meant that disgruntled creditors who did not want the restructure plans to proceed were able to sell their debt rather than challenge the proposed restructure plans or enforce their debt.⁶⁹ Alternatively, there was some flexibility in which a scheme of arrangement or a CVA, for example, could have been utilised by a company in administration in order to access the statutory moratorium. Notwithstanding the benefits from these alternative insolvency procedures, it should be noted that the costs and time required to use administration as a vehicle to achieve a restructuring plan was problematic, and in some cases wholly inappropriate if the intended restructure was complex and extensive.

The new restructuring plan contained within Part 26A of the Companies Act 2006,⁷⁰ draws some insight from a Scheme of Arrangement under Part 26 of the same Act, but there are some notable practical and theoretical differences. Part 26A restructuring plans are primarily designed for companies in financial difficulties that are or will affect its ability to carry on business as a going concern.⁷¹ The plan because it is facilitated by the court, provides flexibility, and finds favour with companies that are keen to bind stakeholders to a rescue plan. In terms of procedure, the court's oversight and approval are similar to a scheme in that there are two hearings. The first hearing

⁶⁵ See Insolvency Service, 'Company Insolvency Statistics July to September 2021', (29 October 2021), at 3.1. Of the 14 companies, nine had a restructuring plan registered at Companies House.

⁶⁶ In respect of its application, the company must have its centre of main interests in the UK to make use of the moratorium, see the recent case of *Re Hydrodec Group Plc* [2021] NSWSC 755.

⁶⁷ Yet, the test is apparently straight forward to satisfy, see A Keay and P Walton, *Insolvency Law: Corporate and Personal*, (5th edn, LexisNexis, 2020), at 213.

⁶⁸ See S. Paterson, 'Rethinking the Role of Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36(4) *Oxford Journal of Legal Studies* 697. For an in depth discussion on the valuation of a financially distressed business for the purpose of allocating equity in exchange for debt see S Paterson, 'Market Organisations and Institutions in America and England: Valuation in Corporate Bankruptcy', (2018) 93(3) *Comparative and Cross-Border Issues in Bankruptcy and Insolvency Law* 801.

⁶⁹ S. Paterson, 'Rethinking the Role of Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36(4) *Oxford Journal of Legal Studies* 697, at 698.

⁷⁰ Introduced by CIGA 2020, Sch 9, Part 1.

⁷¹ See new CA 2006, Part 26A, s.901A(2). This differs from a Scheme where there is no such requirement that a company must first experience financial difficulties. See also *Pizza Express Financing 2 Plc* [2020] EWHC 2873 (Ch), where the court ordered the convening of three separate meetings for the consideration of a restructuring plan after it encountered financial difficulties brought by COVID-19 would affect its ability to carry on business as a going concern.

considers class composition, jurisdictional issues and what information is provided to creditors. Of interest, is the cross-class cram-down feature which will have implications for how rescues are implemented and perhaps the type of rescues that could occur in the circumstances.⁷² If the cross-class cram-down rules are met this would permit a restructuring plan to be approved with the decision imposed on any dissenting class of creditors.⁷³ On this point, the rules dictate that the plan can be applied provided that at least one class of creditors “who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative” voted in favour of the restructure plan.⁷⁴ This is dependent on the second requirement, which provides that dissenting creditors would not be any worse off under the plan than they would have been upon the court deciding what to do with the company should the restructure plan be rejected.⁷⁵ While this would invariably require comparisons to be made to different outcomes to determine valuations between immediate liquidation or another insolvency process, creditors can benefit from this approach as it can reduce strategic costs, increase the aggregate pool of resources, and it is more efficient than other means in its pursuit to collectivise debt.⁷⁶ In this respect, creative value can be identified and protected in restructuring plans and help determine the merits of the rescue itself.

The new restructuring process was first used in the financial restructure of *Virgin Atlantic Airways*,⁷⁷ which provides significant commentary on several key issues that includes the input of creditors and shareholders in the valuation process. To begin, the restructuring plan generally permits a compromise of both the debt and equity claims of creditors and/or shareholders which the court is satisfied have no ‘genuine’ economic interest in the company.⁷⁸ A crucial consideration here, which differs for example from the scheme of arrangement, is that while every creditor or member of the company whose rights are affected by the compromise must be permitted to participate in a meeting, this does not apply if these persons have no genuine economic interest in the company.⁷⁹ The additional requirement of economic interest provides the scope for valuation arguments to emerge since it will determine whether a creditor is in line to receive money, which if not could render them without a genuine economic interest and as such ineligible to vote on the restructuring plan. It is probable that future case law on this issue will be useful to determine what valuation evidence would suffice, and what instances would show whether a creditor is ‘out of the money’ in terms of economic interest. This matter is likely to be further complicated when multiple classes of creditors are evident.

In terms of the plan itself, since the court has to sanction the restructuring plan, it is inevitable that the process will involve a review of the creditors’ interests to determine fairness.⁸⁰ In reality the

⁷² Further issues are likely to arise as to what amounts to ‘fair’ or ‘just and equitable’ in such circumstances with the court careful not to apply its own views, but rather apply the rationality test, see Snowden J in *Virgin Active*, para 221 onwards.

⁷³ A focus on compromise is evident in the new Part 26A, s901F(1).

⁷⁴ CA 2006, Part 26A, s901G(5).

⁷⁵ Although the same general principles of class composition applied to Pt 26A plans as applied to Pt 26 schemes, a rigid application of those principles might not always be appropriate in the different context of a Pt 26A plan, *Re Virgin Atlantic Airways Ltd* [2020] RWHC 2191 (Ch); *Re Gategroup Guarantees Ltd* [2021] EWHC 304 (Ch); *Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch).

⁷⁶ Valuation concerns are elevated where it is necessary to rely on the court’s cross-class cram-down power, as it may lead to the disclosure of too much detail as to the valuation of the company’s key assets to the plan creditors, which may lead to adverse consequences on subsequent rescue plans. However, the flow of information should not be “unreasonably impaired”, see *Re Smile Telecoms* [2021] BCC 587, para 51.

⁷⁷ [2020] EWHC 2191 (Ch).

⁷⁸ CA 2006, s901C (4).

⁷⁹ *Virgin Atlantic Airways* [2020] EWHC 2191 (Ch), para 44.

⁸⁰ In regard to a Part 26 scheme the court would not at the convening hearing consider the merits of fairness of the proposed scheme, see *Re Virgin Atlantic Airways Ltd* [2020] BCC 997, para 35. If the scheme was

consideration of other interests in a restructuring plan would defeat an insolvency mechanism that purely promoted wealth maximisation theories.⁸¹ In this respect fairness would include non-creditor interests and the impact that failure would have on them. It is however important to be mindful that not all interests are equal, nor can all interests be defined within an insolvency context. Thus, it is important that the court assesses the fairness of the result,⁸² and should the court be satisfied with its findings, then the restructuring plan will be confirmed at the second hearing, which will mean that the plan would become binding on affected creditors and shareholders.⁸³ In this respect the pursuit of a rescue plan that utilises the restructuring tool ensures that the value of the company is protected against further decline.

The last issue to note concerns the drivers behind the restructuring. Since the restructuring process is not a formal insolvency process and is driven by the applicant, which is usually the debtor company, the court will not intervene in the final decision. On this basis, while the plan is most likely to be initiated by the financially distressed company,⁸⁴ it is possible for creditors and shareholders to also make an application to court to commence the restructuring procedure.⁸⁵ Yet, given the significant task to undertake a viable and realistic restructure plan it is unlikely that the stakeholders would account for many applications; a factor that likely leaves such plans in the hands of the company. While the restructuring may likely benefit non-creditors and considers the wider impact of failure, it does not promote broad stakeholder interests *per se* given the difficulties that they face in initiating restructuring plans. Instead, restructuring plans are more likely to be driven by secured creditors who are in a position to pursue their own interests through the ailing company. This view is further supported by the indifference on the matter whether to rescue the company as a going concern since the focus is on the optimum value that can be realised. Yet, should the restructuring plan be implemented with the protections afforded by the new moratorium, as discussed above, this would prevent value destruction and certain actions against the company.⁸⁶

c) Restrictions on termination of contracts for the supply of goods and services

The final permanent provision introduced by CIGA 2020 concerns a prohibition on the operation of termination clauses in contracts for the supply of goods and/or services where the counterparty enters a relevant insolvency process.⁸⁷ Under the conditions provided, suppliers would not be able to

approved by the statutory majority, then fairness would be considered, see *Re Telewest Communication Plc (No1)* [2004] BCC 342, para 14. However, in *Virgin Atlantic Airways*, it was held that para 6d of the Practice Statement should be adopted at the convening hearing for a Part 26A restructuring plan.

⁸¹ See generally, N Grier, 'Well, what would you do? Reflections on the need for a theory of bankruptcy law', (2021) 32(4) *ICCLR* 221, at 224.

⁸² *Re Telewest Communication Plc (No1)* [2004] BCC 342, para 41.

⁸³ Guidance on the explanatory statement was given in *Re Sunbird Business Ltd* [2020] EWHC 2493 (Ch).

⁸⁴ The financial difficulties entry threshold should be construed broadly, which includes a lossmaking company, a company in a terminal state of financial difficulties, and a solvent wind-down of a company, see *DeepOcean* [2021] EWHC 138 (Ch).

⁸⁵ CA 2006, s901A (3).

⁸⁶ The restructure plan may involve payments made to creditors in exchange for the compromise of those creditors' claims against the company, see *Re Amicus Finance Plc* [2021] EWHC 2255 (Ch). Further, concerns regarding the applicability of restructuring plans post Brexit are unfounded as recognition is likely to be based on private international law or other cross border frameworks, see *Re Gategroup Guarantees Ltd* [2021] EWHC 304 (Ch), where it was held that restructuring plans are insolvency proceedings for the purposes of the bankruptcy exclusion in the Lugano Convention [2007] OJ L339/3. For an overview, see I West, 'Reflections on a year of restructuring plans', (2021) 34(3) *Insolv. Intell.* 62.

⁸⁷ The new provision is set out in IA 1986, s233B. Applies where the insolvency procedure commenced on or after 26 June 2020. As such they will apply in respect of contracts entered into before as well as after the date.

terminate a contract or supply goods/services because the company entered insolvency;⁸⁸ or for breaches which occurred prior to the relevant insolvency procedure;⁸⁹ or make it a condition that future supplies is subject to pre-insolvency arrears being paid.⁹⁰ In this regard, the prohibition is designed to restrict further economic pressure being applied by creditors which could lead to the failure of the financially distressed company .

Nonetheless, while a prohibition is in place, termination could readily occur should new breaches ensue after the insolvency procedure begins.⁹¹ The prohibition is therefore light touch in nature as the termination can occur with the permission of the IP or directors; or with the permission of the court if it is satisfied that the continuation of the contract would cause the supplier hardship.⁹² The use of hardship within an insolvency context poses another opportunity for professional discretion to be applied, which could result in varied outcomes. Likewise, fairness was a term that appeared in both the moratorium and the restructuring plan, and the termination of contracts is no different in that respect. To determine the threshold required to substantiate supplier ‘hardship’ is likely to be a key area for debate in future case law since no statutory definition has been provided.⁹³ In all likelihood the courts will have to provide some guidance to help resolve disputes that arise on this point, which is expected to concentrate on two points. First, whether the supplier can continue to supply goods without the risk of insolvency, and second, what impact would the non-supply of goods have on the debtor company and whether this is reasonable given its implications on possible rescue strategies. In this respect the requirement to establish hardship recognises broader interests in that it is concerned with the implications of failure, the effect it may have on wealth creation, and actions that may hinder company rescue. The lack of enforcement of these rights may promote rescue that considers other interests beyond the company and its creditors, but it is on the condition that the debtor company is not excluded due to the type of business it is,⁹⁴ and that it has a value that justifies the proposed rescue proceedings.⁹⁵ If this is not satisfied, then creditor wealth maximisation theories that only consider creditors’ interests should be pursued. However, given that CIGA 2020 was also in response to COVID-19, the focus should recognise the intention of the policymakers to promote social good rescue norms that aid the management of financial distress rather than providing additional barriers to rescue. The importance of this issue is realised with the temporary exclusion for small suppliers;⁹⁶ a

⁸⁸ See IA 1986, s233B (1) – (3). This would not be relevant in instances where the company was not in administration, see *P&O Princess Cruises International Ltd v Demise Charterers of the Columbus* [2021] EWHC 113, para 36.

⁸⁹ This includes where a moratorium is in force; the company is in administration; where a CVA takes effect in relation to the company; company enters liquidation, or a provisional liquidator is appointed; or a convening order is made by the court in relation to a restructuring plan.

⁹⁰ IA 1986, s233B (7). However, the supplier must be paid during the restructuring of the company.

⁹¹ Which includes a moratorium under Part A1; administration; administrative receivership; CVA; liquidation; provisional liquidation; or restructuring plan. It does not include a scheme of arrangement as this is not an insolvency procedure.

⁹² IA 1986, s.233B (5)(c).

⁹³ Hardship is mentioned only, not examined in *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), para 131.

⁹⁴ See IA 1986, Sch. 4ZZA. The list includes financial institutions and capital markets contracts, such as insurers, banks, electronic money institutions, investment banks and investment firms, payment institutions, securitisation companies.

⁹⁵ There is no obligation to continue to supply finance to companies in a relevant insolvency procedure, see IA 1986, Schedule 4ZZA, s13(2)(a)(i).

⁹⁶ See CIGA 2020, s.15. The temporary exclusion for small suppliers had been extended by The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021, to 30 June 2021. This exclusion has now ended.

significant measure given that small businesses account for 99.3 per cent of all businesses in the UK, which support 13 million jobs.⁹⁷

4. The importance of Creative Destruction in insolvency law

In response to the discussion above, there are concerns whether CIGA 2020 prevents the natural failure of companies and hence hinders the wealth creation process. To begin to address this it is first important to note that the post COVID-19 economy does not infer that this should be recognised as a new economy.⁹⁸ Instead, it is suggested that statutory changes to the law are required to modernise the old system to make it fit for purpose.⁹⁹ To that end, the business world is in a transition period which once complete will lead to the transformation of the market economy – an economy that accommodates the new challenges in the post-COVID 19 environment.¹⁰⁰ In its current form, capitalism, which is both evident in countries like the UK and US, have shown to be an effective way to provide for the needs of people and foster the democratic and moral values of a free society.¹⁰¹ While the economic model is not beyond fault, capitalism largely provides an environment for companies to pursue profits while simultaneously attempting to enlarge its market presence at the expense of its competition. Although capitalism does promote creativity through its destruction of inefficient companies, it is also imperfect and provides for a wasteful and inefficient process to reach that end.¹⁰² Perhaps more accurately, capitalism may be considered as an evolutionary process, but there is a concern that it can generate change even if that creates more problems than it solves.¹⁰³ For instance, a company may increase its market share in its respective business eco-system through its intent to become more efficient in its production methods than its rivals.¹⁰⁴ Yet for this to occur its business rivals or the processes relied upon with the industry are

⁹⁷ See BEIS, 'Business population estimates for the UK and regions 2020: statistical release', (2020), available at <[Business population estimates for the UK and regions 2020: statistical release \(HTML\) - GOV.UK](https://www.gov.uk/government/statistics/business-population-estimates-for-the-uk-and-regions-2020)> (www.gov.uk)>.

⁹⁸ There is a recognition that a new kind of economy is needed: fairer, more inclusive, less exploitative, less destructive of society and the planet. Such change would include transforming the relationship between capitalism and the state; between workers and employers; between the local and global economy; and between those with economic assets and those without. See, J Guinan and M O'Neill, 'From Community wealth-building to system change', 25(4) *IPPR Progressive Review* (2019) 382-392.

⁹⁹ For example, see 'inclusive capitalism' promoted by the Bank of England, which concerns delivering a basic social contract comprised of relative equality of outcomes; equality of opportunity; and fairness across generations. This can be seen in a speech given by Mark Carney, then the Governor of Bank of England (2013-20), at the conference on Inclusive Capitalism, London, 27 May 2014.

¹⁰⁰ The impact of austerity in the aftermath of a financial crisis have been noted to result in several changes, the causes of which may be economic, social, cultural, legal, or political, see J Gant and A Kastrinou, 'The Impact of Austerity in the Framework of Corporate Rescue and the Rights of Workers in the EU: A Road to Recovery?' (2017) 26(2) *IIR* 176-203. Further, the effective transfer of production to the developing world as globalisation has occurred has led to this transition, see T Wiedmann et al., 'The material footprint of nations', (2015) 112(20) *Proceedings of the National Academy of Sciences of America*, pp. 6271–6.

¹⁰¹ However, Capitalism is not without its faults. For an overview on the key issues of modern Capitalism, see M Jacobs and M Mazzucato, 'Rethinking Capitalism', in M Jacobs and M Mazzucato, *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth*, (Wiley-Blackwell Publishing, 2016) pp. 1 – 23; also, see S Rangan, 'Performance and Progress: Essays on Capitalism, Business and Society', (Oxford Scholarship Online, 2015).

¹⁰² See N Hanauer and E Beinhocker, 'Capitalism Redefined' (2014) 31 *Democracy Journal* 33. A detailed discussion on the credibility of Capitalism goes beyond the scope of this paper.

¹⁰³ Verdoes and Verweij, op cit., (2018), n 32, at 403.

¹⁰⁴ D Baird and R Rasmussen, 'The End of Bankruptcy' (2002) 55(3) *Stan. L. Rev.* at pp. 757-758.

destroyed so that it can replace competitors and lead as an innovator in the market. This process, as discussed above, is known as creative destruction.¹⁰⁵

The creative cycle is concerned with innovations, the destruction of which largely depends on the imagination of the entrepreneur and how relentless they are to adapt to change. The innovations come in many forms and involve decisions that are often complex, involve multiple parties, and concern strategic and technological considerations. To what extent innovations are efficient depends on two distinct factors. First, the managerial experience and skillset which is needed to develop and pursue efficient processes or production, and second, the existence of a proper transactional framework. Both factors are prerequisite to the sufficient development of wealth creation that in turn replaces inefficient old processes. Failure should therefore be understood as a natural event and one that is likely to be felt immediately and with severe consequences once the inefficient element in question interacts with the process of creative destruction.¹⁰⁶

The scale of creative destruction that occurs is relative to the perspective taken. If the focus is on individual companies, then the significance would tend to concern its management and competences. While institutional limitations could still be relevant such as access to external finance, these would only contribute to corporate failure broadly if they formed a barrier to companies generally. To test the extent to which institutional limitations could exist, COVID-19 has acted as a useful litmus paper to establish the extent to which the institutional structures contribute to creative destruction. The institutional barriers can hinder rescue efforts within an economy since it may not provide the legal or financial assistance for companies to exploit new technological opportunities and permit companies to quickly adapt to an ever-changing environment. Institutional failure to address these issues can result in dysfunctional markets, resource misallocation, economic stagnation, and subject companies to extended exposure to the destructive cycle.¹⁰⁷

Further difficulties arise when creative destruction is applied to complex situations whereby the creative element can emerge differently depending on how the destruction occurs. It should also be noted that creative destruction is not merely concerned with the discard of old structures but calls for new horizons to be widened; in other words, the creation must be creative.¹⁰⁸ Yet, while entrepreneurs are encouraged to innovate by destroying aged processes and products, the process is endless which inevitably also results in uncertainty.¹⁰⁹ This is an unavoidable result of capitalism since companies must compete to gain a competitive advantage. The process of destruction is accelerated at times of wide economic disruption such as what has occurred during COVID-19, which

¹⁰⁵ J Schumpeter, op cit., n 21, at 83.

¹⁰⁶ Business life involves taking risks and dealing with crises; only those able to compete will progress and survive. See, M White, 'The Corporate Bankruptcy Decision' (1989) 3 *Journal of Economic Perspectives* 129; for the impact of failure, see R Caballero and M Hammour, 'The cleansing effect of recessions' (1994) 84 *American Economic Review* 1350; R Caballero and M Hammour, 'The cost of recessions revisited: a reverse liquidationist view' (2005) 72 *Review of Economic Studies* 313.

¹⁰⁷ See generally, T Redek and A Sušjan, 'The impact of institutions on Economic Growth: The Case of Transition Economies' (2005) 39(4) *Journal of Economic Issues* 995; for a detailed discussion on the impact of technological change, see L Pradella, *Globalisation and the critique of political economy: new insights from Marx's writings*, (London, Routledge: 2014).

¹⁰⁸ Beyond its application to economic theory and systems, the term creative destruction has been applied to the loss of heritage in service to urban development and renewal and rural reinvestment as well as to disruptive development driven by global sustainability concerns, see E Avrami, 'Creative destruction and the social (re)construction of heritage' (2020) 27(2) *International Journal of Cultural Property* 215, at 216.

¹⁰⁹ Survival might be regarded as a purely random result of complex interactions among competing organisations, see C Stubbart and M Knight, 'The case of the disappearing firms: Empirical evidence and implications' (2006) 27(1) *Journal of Organisational Behaviour*, 91, at 98.

means companies are faced with an array of financial difficulties on a scale that would unlikely be comparable to a time outside of a recession or pandemic. Such destruction would occur irrespective of how a company performed against others since its survival would be based on its ability to be creative, efficient, and organised. However, if insolvency laws were not effective in their design to help companies when destructive signs have been identified, then this could lead to insolvent yet viable companies needlessly failing. The CIGA 2020 measures were therefore necessary to limit the needless destruction of viable companies through the development of specific legal and economic strategies. Nevertheless, it is important to note that corporate rescue should not be artificial and merely a process that postpones the inevitable failure of the company. Examples of this can be seen in recent years whereby many companies on the UK's high street struggled to survive as the economic impact of COVID-19 took hold. Established companies such as Debenhams had utilised a CVA to restructure,¹¹⁰ before a 'light touch' administration was applied more recently.¹¹¹ The latter procedure, which leaves directors in charge of the company as opposed to the administrator, failed, and resulted in Debenhams's liquidation. In another instance, the Arcadia group (Topshop, Topman, Miss Selfridge, Dorothy Perkins, Evans, and Burton) entered classic administration before aspects of the business were sold to online retail competitors. Both cases highlight how rescue driven agendas have the potential to diminish the going concern value of a company by prolonged exposure to the markets and taking measures that fail to adequately address its economic distress. While in some cases it must be recognised that should the directors and shareholders of a company express the view that the best way forward is for the property of a single asset company to be sold, that would indicate that they "had effectively abandoned at least for the moment any prospect of being able to rescue the company themselves".¹¹² Rescue procedures are therefore sometimes determined by circumstances which often leave the available options limited.

In terms of the extent of creative destruction that occurs in the markets, recent figures suggest that creative destruction accounts for around 25 per cent of productivity growth,¹¹³ compared with 77 percent from product improvements by existing companies.¹¹⁴ The data suggests that it is the changes that occur from within current companies, rather than new entrants that resulted in growth. This suggests that companies that can take advantage of the new standalone moratorium or the new restructuring plan can survive if they have the means to innovate.¹¹⁵ This would indicate that CIGA 2020 measures may assist rescue strategies. Yet because the very existence of innovation threatens existing companies, there is the possibility that some companies would attempt to fight advancements if they cannot compete. To that end, if economic recovery is desired, there must be laws in place which will aid both company survival of viable companies and incentives in place that can finance and encourage the growth of new businesses. In response to the former issue, efforts to restructure businesses typically declines during recessions and this is likely to apply equally to a pandemic, irrespective to the benefits that could be gained from the new moratorium or the Part

¹¹⁰ IA 1986, s.1. But note the note the challenges to the CVA in *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2303 (Ch).

¹¹¹ See *One Blackfriars Ltd (In Liquidation)* [2021] EWHC 684 (Ch); *Re Debenhams Retail Ltd (In Administration)* [2020] EWHC 921 (Ch); *Re Carluccio's Ltd (In Administration)* [2020] EWHC 886 (Ch).

¹¹² *Re One Blackfriars Ltd (In Liquidation)* [2021] EWHC 684 (Ch), para [331].

¹¹³ For the lower percentage figure see, D Garcia-Macia et al., 'How Destruction Is Innovation?' (2019) 87(5) *Econometrica, Econometric Society* 1507, at 1509.

¹¹⁴ *id.*, at 1523.

¹¹⁵ For a vast quantity of empirical research demonstrating creative destruction in practice, see, P Aghion and C Antonin, *The Power of Creative Destruction: Economic Upheaval and the Wealth of Nations* (Belknap Press, 2021).

26A restructuring plan.¹¹⁶ This is partially due to the nature of restructuring plans since it may not necessarily result in a downsized company since the number of employees required to fulfil production obligations may be already streamlined.¹¹⁷

The final issue to note is while it remains crucial that old inefficient companies are replaced to generate wealth and growth, it is not always certain as to what extent this benefits the general well-being of society. Further, it may also provide some inconsistencies and conflict with some other aims of rescue such as the preservation of jobs.¹¹⁸ In addition, companies tend to focus on what benefits the shareholders, even if they are obliged to consider the interests of other stakeholders. At the point of insolvency, the creditors' interests rather than the shareholders become the main concern, and it is to this end that the economic decisions are made.¹¹⁹ While this approach may appear to serve the interests of companies as opposed to society, Schumpeter observed that that modern industrial capitalism had produced the greatest economic wealth ever recorded and improved the standard of life of the masses.¹²⁰ Nevertheless, the scale and nature of destruction that occurs is dependent on the type of company in question since this will determine the value that can be rescued as the next section explores.

5. THE VALUE RESCUED WITHIN THE MODERN COMPANY

In the previous sections it was recognised that wealth creation is a crucial component to the economy in its efforts to respond to destructive events like COVID-19. The importance of CIGA 2020 and its temporary measures were considered so critical that several subsequent extensions were considered necessary to counter the economic fallout.¹²¹ Yet despite these measures, corporate failure may still occur, and this will affect the value of the company. It is therefore necessary that the law considers future economic cycles and does not fail to deal with issues that may unjustly hinder or disrupt the creative value in a company.

In practice, a high proportion of administrations do not pursue the rescue of the company as it is not reasonably practice to do so.¹²² This tends to lead to the alternative objective of better result for the creditors as a whole to be pursued. This objective often involves the sale of the company's business

¹¹⁶ See *Re Amicus Finance plc (in administration)* [2021] EWHC 3036 (Ch). The Restructuring Plan proposed in this case was the first to be proposed by insolvency officeholders, demonstrating its utility as a tool for administrators and in effecting a rescue of a company as a going concern following an administration.

¹¹⁷ Restructures usually involve the planned set of policies and practices to realign the workforce with the goal of improving organisation performance, and hence, does not include reduction of the workforce per se, see R Aalbers and P Philippou, 'The Executioner's Dilemma: Explaining the role stress by ethical conflict among those who carry out a downsizing event', in J Adriaanse and J van der Rest (eds) *Turnaround Management and Bankruptcy* (Routledge, 2017) at 196.

¹¹⁸ If the effective restructuring of companies occurs it can save jobs, and this provides benefits to the wider economy, see A Renssen, 'Corporate Restructuring and Corporate Dissolution of Companies in Financial Distress: ensuring Creditor Protection. A Comparison of the US, UK and Dutch Models' (2020) 26(2) *International Insolvency Review* 204, at 204.

¹¹⁹ While the facts in *Sequana* did not give rise to the discussion on "whether, once the creditors' interests duty is engaged, their interests are paramount or are to be considered without being decisive...it is hard to see that creditors' interests could be anything but paramount.", see *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, para 222 [Lord Justice David Richards].

For a discussion on whether to let every party talk to each other director to better enable negotiation of a single binding agreement, see S Madaus, 'Reconsidering the Shareholder's Role in Corporate Reorganisations under Insolvency law (2013) 22(2) *International Insolvency Review* 106.

¹²⁰ Schumpeter, op cit., (1942), n 21, Ch 7.

¹²¹ See CIGA 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021.

¹²² *Key2Law (Surrey) LLP v De'Antiquis* [2011] EWCA Civ 1567, at para [33].

and undertaking, either in whole or in parts, even if the administrator is of the opinion that rescue is possible but it would not produce a better result in terms of what paragraph 3(1)(b) could achieve.¹²³ In essence, the pursuit of business rescue is overlooked as the measures provided in CIGA 2020, such as the standalone moratorium and restructuring plan, are focused on company rescue despite the possibility that better value enhancing alternatives could exist.

Yet, in the recent decision of *Re One Blackfriars Ltd* it was held, *inter alia*, that unlike receivers administrators do not owe an *absolute* duty to obtain the best reasonably obtainable price (a non-delegable duty in strict liability). Instead, they are obliged to only take reasonable care to obtain the best price that the circumstances permit, as they reasonably perceived them to be.¹²⁴ The decision had further significance as it also dismissed the argument raised in the decision of *Davey v Money* that it was paradoxical or inconsistent with the Enterprise Act 2002. It argued that its main purpose was to shift the emphasis of administration in the direction of corporate rescue and not to assist in “determining whether it is appropriate or not to extend the rule to non-delegability to administrators when it is alleged that things have gone wrong in an administration”.¹²⁵ The focus on rescue ensures that the value of the company and its assets are considered, and as agents of the company the administrators are concerned with the sale or marketing of the company. Nevertheless, the rescue viability test is subject to commercial rather than legal considerations.¹²⁶ Thus, it is the market that largely dictates what should happen to the company.

There is however an assumption that the optimum value of a company is as a going concern rather than the liquidation of its assets. This approach has potentially led to alternative strategies being ignored (options that may benefit the creditors) since other benefits such as job retention, the protection of local economies and supply chains are feasible objectives. Yet, the pressure to pursue rescue on a going concern basis, that also fulfils a ‘social good’ objective, can be driven by the fear of litigation from disgruntled creditors. The difficulty with this approach is that no guarantee can be offered with any rescue package; a factor that could instead lead to a reduction in the value of the company in the medium-to-long term range. In addition, continuing the company’s business and seeking a restructuring could exacerbate the plight of creditors, as the professional costs associated with restructuring a business can be very high.¹²⁷ The decision to rescue should therefore be determined on where the higher value resides, whether that is in the company or its assets, unless public policy considerations are considered relevant as seen in recent cases such as Carillion and British Steel.¹²⁸

a. Company-specific assets

In regard to wealth creation and value, some commentators, such as Jackson, Baird and Rasmussen, have suggested that modern companies have no going concern value, instead companies are merely

¹²³ The opinion of the administrator must contain evidence as to what purpose is likely to be reasonably achieved, see rule 2.3(5) of the Insolvency Rules 1986.

¹²⁴ [2021] EWHC 684 (Ch), paras [211]-[222]. The decision follows that by Snowden J in *Davey v Money* [2018] Bus LR 1903, para [388], which approved *Re Charnley Davies Ltd (No.2)* [1990] BCC 605, at 618B-C.

¹²⁵ *One Blackfriars Ltd (In Liquidation)* [2021] EWHC 684 (Ch), para [219(4)].

¹²⁶ While the going concern outcome is not “legally impossible, it is commercially almost inconceivable”, see *Interactive Digital Systems Ltd v VST Enterprises Ltd* [2021] EWHC 887 (Ch), para [41(e)]

¹²⁷ Yet, there are more opportunities to negotiate and consult in a restructuring when compared to most CVAs, see, *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 1209 (Ch), para 199.

¹²⁸ A Keay, Finally Distressed Companies, Restructuring and Creditors’ Interests: What is a Director to do? (2019) 2 *Lloyd’s Maritime and Commercial Law Quarterly* 297, at 301.

a pool of assets that can be easily replicated and separated at ease.¹²⁹ This argument has not gone without criticism since it failed to consider ideals that go beyond those of the balance sheet.¹³⁰ For example, it does not consider the value of relationships or teams as important, nor are the wealth maximisation theories often applied in a contemporary context; a shortcoming given the widespread use of intangible assets in modern companies.¹³¹ The rise of information-technology and high-tech companies, which are increasingly artificial intelligence led, has led companies to become less reliant on tangible assets.¹³² Yet while intangible assets are likely to represent a valuable part of the company, how and if this value can be extracted at the point of failure will help to define whether the company has creative value.¹³³

If the value resides in the going concern, this tends to mean that assets are valued higher if they are located together within a company. Yet, if this is the case and the assets can be used elsewhere, then the company has no value as a going concern.¹³⁴ Instead it would seem that the value must come from dedicated or company-specific assets. In response to this suggestion, Baird and Rasmussen proposed that companies rarely had such assets, and as such there was nothing to reorganise, nor much to warrant preservation.¹³⁵ The dismissal of these dedicated assets appears short sighted since it implies that the going concern value can exist only as a characteristic of specific assets, which fails to recognise going concern value in teams (human capital) and relationships (networks).¹³⁶ These relationships are not merely between people, but can be among assets or between people and assets,¹³⁷ which can result in countless relationships with people inside and outside of the company – including creditors, customers, suppliers, regulatory agencies and others.¹³⁸ As a result, these relationships are complex but as they continue to develop the costs the company incur in creating each of them become streamlined and competitive.¹³⁹ It is this relationship value, as LoPucki suggests, which is a key value within the company and one that needs to be preserved since many of the costs must be incurred again if the company should fail.¹⁴⁰

To this end, the complexities associated with automated companies should be compared to the attributes of traditional industries that were prevalent at the time Schumpeter developed the creative destruction concept. Generally, assets within modern companies tend to be even less dedicated to a particular company than those associated with traditional industries such as cotton mills, power

¹²⁹ Baird and Rasmussen, op cit., (2002), n 104, at 754.

¹³⁰ For some discussion on proposed shifts in the insolvency paradigm, see for example T Jackson, 'A Retrospective Look at Bankruptcy's New Frontiers' (2018) 166 *Uni Pennsylvania L Rev* 1867 and D Skeel and G Triantis, 'Bankruptcy's Uneasy Shift to a Contract Paradigm' (2018) 166(7) *Uni Pennsylvania L Rev* 1777.

¹³¹ M Jensen and W Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure* (1976) 3 *J. Fin. Econ.* 305, at 310.

¹³² See generally, OECD, 'Artificial Intelligence in Society' (OECD Publishing: 2019); OECD, 'Job Creation and Local Economic Development 2018: Preparing for the Future of Work', (2018) OECD Publishing, Paris.

¹³³ It is also important to note that the lack of intangible assets in companies may prevent going concern values.

¹³⁴ Baird and Rasmussen, op cit., (2002), n 104, at 758.

¹³⁵ id, at 767.

¹³⁶ R Butler and S Gilpatric, 'A Re-examination of the Purposes and Goals of Bankruptcy' (1994) 2 *Am. Bankr. Inst. L. Rev.* 269, at 281.

¹³⁷ R Coase, *The Nature of the Firm: Influence, in The Nature of the Firm* (Oliver E Williamson and Sidney G Winters eds, 1991), at 64.

¹³⁸ LoPucki, 'The Nature of the Bankrupt Firm: A Reply to Baird and Rasmussen's The End of Bankruptcy' (2003) 56(3) *Stan. L. Rev.*, at 652.

¹³⁹ id, at 652.

¹⁴⁰ id, at 652.

stations, and mines.¹⁴¹ Should these type of companies fail to evolve, or they become inefficient in their production, or offer products that are no longer desirable, their value, like other limited dedicated assets will decrease in economic importance.¹⁴² In a similar manner, COVID-19 has disrupted the value of assets in three major ways. First, it has accelerated the reliance on technology by both consumers and companies, which has altered consumer behaviour. National lockdowns have required consumers to shop online, and due to the longevity of this trend it is likely to remain post pandemic. It is plausible that this could result in the further decline of the traditional high street as consumers will either prefer online platforms, or companies will have moved their business entirely online.¹⁴³ Second, the economy is no longer in a state of transition to a service-based and information-based economy, it has essentially completed that leap.¹⁴⁴ Third, the reliance on technology and the transformation in the economy has increased the standardisation of key assets within companies.¹⁴⁵ Outwardly, these three factors indicate that companies have continued to rely less in the way of company-specific assets, in favour of assets that are either readily replicated or are intangible. While this does not mean that standardised assets within industries are valueless or incapable of being considered as part of the going concern value. Instead, it does mean that there are no requirements that the assets are unique, only that they provide some transferable value within the wider business eco-system that is sought by competitors. Many companies will find that their competitors operate with a similar business plan, utilise comparable technology, and employ workers in parallel roles. Accordingly, if assets are standardised and offer nothing that could be classed as particularly unique, then this position fails to address what is it that attracts interest from investors or rival companies.

An example that demonstrates this is the recent decline of the British department retailer, Debenhams, at the end of 2020. What was once the leading department store in the UK, Debenhams was subsequently bought by the online retailer, Boohoo. Rather than purchase the entire business, what concerned Boohoo was that the going concern value in Debenhams continued to diminish during COVID-19. The value that remained in Debenhams was not in the remaining 118 stores, or the human capital (12,000 jobs), but in the intangible assets, namely the brand and its website.¹⁴⁶ The specific nature of the eventual asset grab of Debenhams illustrates what lies ahead for traditional large retailers who predominately operate from physical premises. Like retailers, companies that offer professional services, such as business, legal and accountancy services are likely to have little in terms of company-specific assets, such as computers and office furniture, but they may have valuable non-material intangible property such as customer goodwill, name recognition, and customer lists. In relation to premises, small and medium sized businesses will tend to rent since this would be cheaper than to own the property and the trend is likely to increase since the recent decision in *Lazari Properties 2 Limited and others v New Look Retailers Limited, Butters and another*,¹⁴⁷ confirms that

¹⁴¹ For example, intangible investments by one firm also tend to have large spill overs to other firms. Unless protected by comprehensive patents, the benefits from R&D investment and software development – not to mention innovations in business organisation, training and branding of products and services – also tend to benefit firms that did not pay for such investment. See J Hakel and S Westlake, *Capitalism without Capital: The Rise of the Intangible Economy* (Princeton University Press, 2018) pp 58-88.

¹⁴² Baird and Rasmussen, op cit., (2002), n 104, at 765.

¹⁴³ For example, the decline of Debenhams was a result of tough competition from online retailers along with high wages, salaries.

¹⁴⁴ See House of Commons Library, 'Service industries: Key Economic Indicators', (September 2020) No.9014, at 11.

¹⁴⁵ There are however some exceptions, notably software companies tend to write their own computer codes, which represent a long-lasting form of knowledge that has no tangible form. See, Hakel and Westlake, op cit., (2018), n 141, at 40.

¹⁴⁶ Boohoo paid £55 million pounds for both the brand and the website. On 12th April 2021, Boohoo relaunched the Debenhams website with a new range of products and brands, most being owned by Boohoo.

¹⁴⁷ [2021] EWHC 1209 (Ch).

CVAs can be used as restructuring and rescue tools to afford businesses greater flexibility to adapt to changes in the market. For companies that do have large assets, the Part 26A restructure reforms contained within CIGA 2020 could assist,¹⁴⁸ as well as the standalone moratorium, if eligible, and the monitor thinks that the moratorium will result in the rescue of the company as a going concern.¹⁴⁹ However, further difficulties could emerge if the value of certain assets in an industry generally depreciate, as well as the relationship between those assets. In this respect, it is likely that assets that are non-company specific will have value beyond the company.

b. Intangible assets

In the latter part of the twentieth century technology developed at an unprecedented level. Many countries that were once engaged in the manufacture of goods were now primarily focused on service-orientated industries.¹⁵⁰ This shift resulted in the value of most companies being found in its intangible assets; its know-how, business plans, and other notable intangibles.¹⁵¹ While intangibles can be broadly conceived, classifications are necessary to ensure that they are separable in the context of identifiable assets and liabilities. This is necessary so that assets can be discarded or sold separately without the risk of the business itself being disposed.¹⁵² Where opinion differs is whether a going concern value can exist in relation to intangible assets; an answer that depends on how intangible value is categorised. Baird and Rasmussen considered that intangibles subsisted of two categories, namely know-how and intellectual property. Yet they dismissed the latter as it is composed merely of non-specific assets since such assets were not necessarily locked inside of a specific company.¹⁵³ The former was dismissed on the concession that know-how would be worthless because the company in question was in economic distress and had failed.¹⁵⁴ While it is correct to assume that intangible assets are not essentially locked inside a particular company, this does not necessarily mean that no going concern value exists. Yet, to determine what value can be realised remains difficult. If liquidation of the assets was deemed to result in the best possible value, the nature of the fire sale might lead to the assets being sold in the markets for much less than they are worth. Alternatively, a pro-rescue stance would indicate that this approach would lead to the creditors to lose out, a factor that is perhaps likely with the debtor-friendly changes implemented in CIGA 2020. While there is no default position to suggest that the assets of a company are always worth more if the company was rescued as a going concern,¹⁵⁵ the going concern assumption constitutes a fundamental accounting principle which becomes even more important in an economic crisis.¹⁵⁶ It follows that intangibles are valued on whether the asset in question belongs to a homogenous population of assets that are equivalent in all material aspects, and whether there is an active market in those assets, evidenced by frequent

¹⁴⁸ CA 2006, Part 26A, inserted by CIGA 2020, Sch 9.

¹⁴⁹ CIGA, Part A1, A6(1)(e).

¹⁵⁰ See, U Witt and C Gross, 'The rise of the "service economy" in the second half of the twentieth century and its energetic contingencies' (2020) 30 *Journal of Evolutionary Economics* pp 231-246.

¹⁵¹ LoPucki, op cit., (2003), n 137, at pp 763-68.

¹⁵² See, I Gheta, 'Theoretical and Methodological Considerations regarding the Evaluation of Intangible Assets' (2017) 9 *Contemp. Readings L. & Soc. Just.* 373-376; but note it could also include email accounts, social media accounts, reward points, and electronic media, see N Banta, 'Property Interests in Digital Assets: The Rise of Digital Feudalism' (2017) 38 *Cardozo L. Rev.* pp 1099-1158.

¹⁵³ LoPucki, op cit., (2003), n 137, at 763.

¹⁵⁴ LoPucki, op cit., (2003), n 137, at 765.

¹⁵⁵ See J Fremgen, 'The Going Concern Assumption: A Critical Appraisal, (1968) 43(4) *The Accounting Review*, pp 649-656.

¹⁵⁶ O Gkouma et al., 'Financial crisis and corporate failure: The going concern assumption Findings from Athens stock exchange', (2018) 5(1) *Journal of Risk & Control* 141, pp 141-142.

transactions.¹⁵⁷ To ascertain the market value requires the asset(s) to be valued against both the company's economic circumstances within the current market economy. This often means few intangible assets are ever readily valued since its useful economic life may have been limited, disputed, or has depreciated extensively. Applied to the post COVID-19 economy, three factors should be considered. First, it should be determined whether the asset(s) has an ongoing use; second, realistically what transferable value would it create outside of the existing company; and third, to what extent do the assets associated with failed companies diminish in value? Simultaneously, the three factors are concerned with wealth creation - whether the value contained in a failed company, if there is one, can be transferred to a new company, and to what extent failure has decimated the creative value. Furthermore, the categorisation of intangible assets can present difficulties since this could act as a barrier that prevents the optimum value from being properly recognised. Subsets like this add further confusion if only the high-level know-how and expertise are considered. This can distort the value as it ignores the going concern value placed in low-level expertise.¹⁵⁸ The know-how, as LoPucki suggests, can continue to have value even when another company has a business plan that is both better and scalable.¹⁵⁹ How broadly this can be applied to modern companies would depend on how the distressed company is restructured and financed since it could save the low-level company-specific expertise while it adopts a more efficient business plan. Construed narrowly, the value of knowledge will eventually be undermined by future developments as creative destruction continues to reduce the distinction between levels of expertise.¹⁶⁰ Capitalism, as noted above, will drive efficiency and lead to the convergence of technologies that cause industries to shift and blur, an event that will change the very nature of products.¹⁶¹ To that end, in the aftermath of COVID-19 it will become apparent that statutory reform like CIGA 2020 will be greatly needed to help companies survive, and further reform will be forthcoming as companies attempt to adapt in the new business environment.

c. Human capital and Teams

The expertise and relationship between employees in a particular team is considered integral and therefore valuable to a company since this is what permits the company to operate its business. Yet, what the exact value of a team is depends on how the team membership is interpreted. For example, Baird and Rasmussen construed teams narrowly, not as an entire workforce, but instead as elite groups of key employees.¹⁶² LoPucki considered that this was needlessly confined since employees who left the company would have to be replaced at a cost and once a company ceased to trade the employees would be dispersed. The value instead should recognise that teams generally do not have redundant roles, otherwise the job would not exist, and so team value should be associated with the bulk of the company's employees as this is where the potential value for going concern resides.¹⁶³ Applied to modern companies, teams tend to be smaller, much more fluid and are often flexible to withstand changes caused by new processes or products. Increasingly workers tend to be more tech based, who have greater mobility within the industry as they have transferable skills.¹⁶⁴ While

¹⁵⁷ Secular stagnation, the argument that we live in a period of permanently slower total productivity growth could also impact the desire for assets. See, Hakel and Westlake, *op cit.*, (2018), n 141, at pp.91-117.

¹⁵⁸ LoPucki, *op cit.*, (2003), n 137, at 655.

¹⁵⁹ *id.*, at 764. LoPucki, considers that the value can continue, at 655.

¹⁶⁰ The wealth of nations is driven by the strength of knowledge, see generally F Hayek, 'The Use of Knowledge in Society', 35 *American Economic Review* (1945) at 519.

¹⁶¹ C Prahalad and V Ranaswamy, 'The new frontier of experience innovation' (2003) MIT Sloan Management Review, pp 12-18.

¹⁶² Baird and Rasmussen, *op cit.*, (2002), n 104, at pp 773-76.

¹⁶³ LoPucki, *op cit.*, (2003), n 137, at pp 655-656.

¹⁶⁴ In 2011, around 80% of workers were in the service industry. See Office of National Statistics, 'The UK service sector' (ONS 2016),

traditionally the team value may have been associated with how a group of workers form an effective team,¹⁶⁵ the increase in remote work and reliance on technology has challenged his view. Typically, at the onset of failure attempts by the company to preserve the team value is often difficult since talented employees can and will seek employment elsewhere.¹⁶⁶ While troubled companies will attempt to retain key workers, who represent the team production value, its ability to do so would not be dependent on the company being the most efficient or successful in its industry.

Further, members within a team can exit the company and apply their knowledge elsewhere, just as their knowledge can be taught and replicated in another company. This knowledge when applied to a team gains value which means that this as an intangible asset that can be transferred to another company. The value attached to team expertise has also transformed from what could be perceived as company-specific to what is increasingly seen as industry-specific, as the value of teams' expertise becomes less company-specific and more standardised. The increased reliance on technology has resulted in smaller teams,¹⁶⁷ but not elite groups within the meaning of Baird and Rasmussen, and more input from technology and artificial intelligence (AI) which has altered the perceived value of teams generally.¹⁶⁸ This was noted above in the recent decline of Debenhams and the lack of interest from buyers to preserve the workforce but save its brand and online platform. Yet where the elite team has value, the new standalone moratorium and restructuring plan are likely to assist in value protection. While it was noted the number of restructures so far have been limited, this will be a rescue procedure that is likely to be used when the team value is at the core of the value of the company.¹⁶⁹

6. CONCLUSION

Since the pandemic occurred it has resulted in two things. First, it has caused disruption in the market economies, and second it has conditioned our socio-economic behaviour to such an extent that it has led us to question current commercial and insolvency practices. Generally, humans are well suited to adapt to new environments and some of the changes that have emerged in the post COVID-19 economy will not only be permanent but represent more efficient ways of doing tasks. This process of betterment can be defined as evolution, and one that has occurred in almost all successful companies. Yet, despite the best efforts of some companies, failure is and will always be an inevitable process of capitalism.¹⁷⁰ Failure must occur because efficiency drives the economy, and COVID-19 has been a catalyst that has accelerated this process. While CIGA 2020 introduced measures to temporarily suspend statutory demands and wrongful trading claims, provide credit for struggling businesses and provide for a job retention scheme for workers, these measures were only provisional. At this point,

<https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/fivefactsabouttheukservicesector/2016-09-29>.

¹⁶⁵ See S Rosen, 'Learning by Experience as Joint Production' (1972) 86 Q. J. Econ. 366; LoPucki, op cit., (2003), n 137, at 645.

¹⁶⁶ H Collins, 'Transfer of Undertakings and Insolvency' (1989) 18 *I.L.J.* 144.

¹⁶⁷ Technology can have the potential to place downward pressure on wages, and force some workers into lower paid, lower skilled jobs or insecure employment, see P Williams et al., 'The impact of disruptive innovation on creative workers: the case of photographers' (2020) *Creative Industries Journal* 1-23, at 3. DOI: 10.1080/17510694.2020.1858707.

¹⁶⁸ The impact of disruption innovation is vast and describes how new technologies or innovative business models can unsettle established markets and existing methods of organising, producing and managing, by providing different value from products or services, see D Yu and C Hang, 'A Reflective Review of Disruptive Innovation Theory' (2010) 12(4) *International Journal of Management Reviews* 435-452.

¹⁶⁹ The value that a restructuring plan can rescue as opposed to other rescue procedures will be explored separately in another article.

¹⁷⁰ Whether it should be an inevitable outcome is a question worth exploring beyond this article.

while the destruction of inefficient companies is likely to see an increase, what should also occur is a rise in innovative entrepreneurial activities. Innovation leads to wealth creation since efficient companies will purchase failed companies as a going concern, or as recent examples have shown, purchase select valued assets.

As a final point to note is whether measures like CIGA 2020 become counterproductive and prolong companies that would have otherwise failed sooner. This leads to two conclusions. First, the rescue measures are artificial and the value within the company had long diminished. This would contribute to an increase in zombie companies.¹⁷¹ Should the number of zombie companies increase and slow productive growth after the pandemic, it would prevent the flow of useful resources, such as finance, to companies that were more innovative and productive. To permit the failure of inefficient companies would therefore encourage the reallocation of its resources to allow creative value to continue elsewhere in the economy and the markets in general.¹⁷² Second, and on a final more optimistic view, rescue, albeit temporary, still provides for wider rescue options and on this basis CIGA 2020 will have fulfilled its purpose in its efforts to enhance wealth creation and limit the effects of financial distress.

¹⁷¹ D Andrews et al., 'Confronting the zombies: Policies for productivity revival' (2017) OECD Economic Policy Papers no.21, OECD Publishing, Paris, <<https://doi.org/10.1787/f14fd801-en>>.

¹⁷² A Knott and H Posen, 'Is failure Good?' (2005) 26 *Strategic Management Journal*, pp 617-618.